No. 12914

In The

United States Court of Appeals

For the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant*,

vs.

KATHLEEN HUTCHENS, *Appellee*.

KATHLEEN HUTCHENS, *Appellant*,

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee*.

Appeal from the District Court of the United States
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

Brief of Appellant C. D. Johnson Lumber Corporation

JAMES ARTHUR POWERS,
NORMAN N. GRIFFITH,
1935 S.W. 12th Ave., Portland 1, Oregon,
Attorneys for Appellant C. D. Johnson Lumber Corporation.

WILLIAM A. BABCOCK,
E. U. SIMS,
Public Service Building, Portland 4, Oregon,
Attorneys for Appellee Kathleen Hutchens.

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JURISDICTIONAL STATEMENT

This is an action at law between citizens of different states in which the appellee Hutchens claims damages of $75,974.71 against the appellant. (Pre-Trial Order, R. 9, 21) Judgment in the sum of $46,500, together with plaintiff's costs and disbursements, has been entered

against the appellant based upon the verdict and a certain remittitur. (Order directing Entry of Judgment, R. 71) It is contended that the United States District Court of the District of Oregon has jurisdiction of this action upon the basis of the above facts, under 28 U.S.C.A., § 1332 (a) (1); and that this court has jurisdiction of this appeal under 28 U.S.C.A., § 1291.

STATEMENT OF THE CASE

Dean Hutchens, appellee's decendent, was found dead alongside his truck on a log unloading dock owned by the appellant C. D. Johnson Lumber Corporation. (R. 9-11) The decedent had a contract with W. R. Francis, a logging operator, to haul logs from Francis' operation at an agreed rate per thousand board feet for the haul as compensation for the decedent's truck and for his services as driver thereof. (R. 13) Francis, in turn, had contracted with the appellant to cut and haul logs to Toledo for $15.00 per thousand board feet net water scale (Defendant's exhibit 1, R. 280). The logs were scaled in the water. (R. 244-5) The decedent was in the process of unloading a log under Francis' contract with the appellant when he was killed.

The decedent was killed by being struck by the log carried on his truck while he was in a position between the trailer of his truck and a brow log at the water edge

of the dock. (R. 10) That position was directly in the path the log had to roll in being dumped into the water pursuant to appellant's contract with Francis. Francis reimbursed the appellant for wages paid the crane operator on the dock for the time the operator spend unloading logs brought in by Francis. (R. 279-80, 283-5)

The case arises under the Oregon Employer's Liability Act, O.C.L.A. § 102-1601—1606, which is a statute unique to Oregon and is preferred by claimants for wrongful death since it is not subject to the $15,000 limit to recovery provided for by Oregon's wrongful death statute. O.C.L.A. § 8-903—4. Furthermore the Act limits the defense of contributory negligence and recovery is paid directly to the beneficiary without the necessity of passing through the estate. O.C.L.A. §102-1604, § 1606. (Text of the Act set out in Appendix)

The protection afforded an employee by the Oregon Employers' Liability Act is also distinct from that provided by workmen's compensation as to which Oregon has one of the usual type statutes. (O.C.L.A. 102-1701 *et seq.*) Before bringing this action the plaintiff as widow of the deceased claimed workmen's compensation on the theory that the decedent was an employee of Francis; the State Industrial Accident Commission rejected that claim. (R. 35, 98-99, 108) When this action was begun the plaintiff filed an election to seek recovery

against a third party (appellant here) and not his employer. (R. 3) This notice of election is required by the workmen's compensation statute. O.C.L.A. § 102-1729.

The logging contractor, Francis, was joined as a third party defendant in this action. On January 20, 1950, appellee Hutchens moved the court for an order that separate pre-trial conferences and separate trials be held in the principal and in the third party actions. (R. 4-6) On June 14, 1950 after pre-trial conferences had been had, the court entered an order that the issues between the appellee and appellant be segregated and that issues between appellant and third party defendant be reserved for a later disposition. (R. 8)

On May 9, 1950 the appellant moved the court for an order requiring the appellee to elect whether she would proceed on the theory that the decedent was an employee of the third party defendant, Francis, or of the appellant. (R. 7) Counsel for appellee stated at pre-trial conference on May 22, 1950, that they abandoned any contention that the decedent was an employee of the appellant in any way. (R. 109-110)

The case proceeded to trial before Judge Gus J. Solomon sitting with a jury on June 20, 1950. A verdict for $68,377.20 in favor of the plaintiff was returned. (R. 54)

Thereafter appellant filed motions for judgment notwithstanding verdict of the jury and for a new trial. (R. 57-63) Subsequently the court filed an opinion stating that the verdict was excessive to the extent of $21,877.20; and if appellee should file a remittitur of that amount, said motions of appellant would be denied and judgment entered on the reduced verdict. If no such remittitur was filed, then motion for new trial would be granted. (R. 76) In due course said remittitur was filed, and appellant's motions were denied and judgment was entered on the verdict as reduced being for $46,500, together with the costs and disbursement of the plaintiff. (R. 71) Appellant then filed notice of appeal from said judgment and thereafter appellee appealed from said judgment to the extent that it was based on the remittitur. (R. 81, 87)

Five main questions are presented by this appeal. The first is presented by the first two specifications which, respectively, object to part of the charge given and to a similar instruction refused and is: must the injured person's employment status as an employee be found before the Act may be applied? The second question which is raised by the third specification is the refusal to admit in evidence a certain ruling of the Industrial Accident Commission.

The third question is dealt with by the Specifications

No. IV through VI and is: what is the effect on recovery under the Act if the injured person was violating certain statutory safety regulations? Specifications No. IV and V specify refused instructions while No. VI specifies the court's refusal to give judgment notwithstanding the verdict.

All the remaining specifications specify refused instructions. Specification X raises the question whether the Act applies here if there is no intermingling of employees, and involves a construction of the logging contract between "logger" and appellant. Specifications VII through IX raise the question of who is in charge as defined in the Act of the unloading operation and also involve a construction of the said logging contract.

SPECIFICATION OF ERROR I

The District Court erred in giving an instruction which totidem verbis was:

> "Your first inquiry therefore will be whether the work of the plaintiff's decendent — that is Dean Hutchens—was engaged at the time of the fatal accident involved risk or danger. If you find from a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time and place of the fatal accident involved risk or danger, then he was entitled to the protection and benefits of the Oregon Employers' Liability Act; * * *
>
> "Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by

W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger.

* * *

"If the plaintiff failed to prove by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the accident, at the time and place of the accident, involved risk or danger, then your deliberations will be at an end and you will return a verdict for the defendant. On the other hand, if you find by a preponderance of the evidence that the work in which Dean Hutchens was engaged at the time of the fatal accident did involve risk or danger then the defendant C. D. Johnson Lumber Corporation was subject to the Oregon Employers' Liability Act and was under a duty to observe and carry out its provisions." (R. 297-299)

The grounds of objection urged at the trial to said instruction were:

"Now, then, with respect to the Court's instruction on the Employers' Liability Act as stated to the jury, that they were first to determine whether risk and danger was involved and if so the Act would apply, we would except to that because we feel that that omits the status of the decedent which in effect is along the same line that we have already dis-

cussed. That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

The Court: I know the instruction." (R. 318)

* * *

"The Court: You may have your exceptions." (R. 320)

Said specification of error covers questions raised by Appeal Point 2.

SPECIFICATION OF ERROR II

The District Court erred in refusing to give the following requested defendant's instructions No. XV and XVII which totidem verbis were:

"I instruct you that if you find from the evidence that the deceased was an independent contractor or an independent subcontractor that this particular action cannot be maintained by the plaintiff and your verdict would be for the defendant. This particular law is designed to apply to employees only and not to independent contractors." (No. XV)

"I instruct you that if you find from the evidence that under the Logging contract that it was the responsibility of the Logger to deliver the logs in the water, then, in that event, the logger would be in control of the log until it was dumped in the water and it would be up to the Logger to comply with the provisions of the E.L.A." (No. XVII) (R. 44-5)

The grounds of objection urged at the trial to the District Court's refusal to give the said instructions were:

"And also we ask the Court for an exception to the Court's failure to give defendant's requested instruction No. 17. I am aware of the fact that the Court has taken a different view of the law in the case than we do, and that instruction has to do with what we considered a defense in the event Hutchens was an independent contractor, it being our theory that if he were an independent contractor, if he was an independent contractor, that he would not be entitled to the benefits of the Act.

"The Court: You raised that in the question on the motion for a directed verdict?"

"Mr. Powers: Yes. The instructions go to the same. * * * (R. 317)"

* * *

"The Court: You may have your exceptions." (R. 320)

The above specification challenges only the refusal of a single requested instruction which is erroneously referred to as "No. XVII." From the context it is clear that appellant's counsel had in mind appellant's instruction No. XV rather than No. XVII. The context also makes it clear that the court so understood him. The court's reference to appellant's motion for a directed verdict make it indisputable that the court's attention was drawn to the objected to matter and the grounds of defendant's objections. (R. 292)

Said specification of error covers questions raised by Appeal Point 7. (Specifications of Error I and II

raise similar questions of law and are hence argued together below.)

Point: The Oregon Employers' Liability Act only protects persons who are employees of someone and therefore the employment status of a claimant must be determined.

Both defendant's requested instruction No. XV and the charge as actually given raise a single point of law: does the Oregon Employers' Liability Act apply irrespective of status of an injured person as an independent contractor if the work involved risk or danger? The court in its opinion denying defendant's motion for a new trial, states the basis of its view:

> "Even though many of the cases refer to the fact that the injured workman was an employee, coverage under the Act was dependent upon whether an injured workman's duties required him to be about the machinery or hazardous work of the owner in the accomplishment of a common purpose in which the owner had an interest. In my opinion, it is immaterial whether an injured workman is required to be on the premises and perform work by reason of a master and servant relationship with either the owner or contractor or because of a contract with either of them. It is the nature of the work and not the technical legal status of the workman which controls." (R. 74)

The appellant contends that this interpretation of the Act is contrary to the consistent construction established by the decisions. The trial court recognizes these

difficulties but attempts to distinguish the cases contrary to its view by saying that such cases merely refer (incidentally) to the fact that the injured workman was an employee.

There is no question that this Act adopted by initiative petition in 1910 is full of ambiguities which have had to be resolved by construction. For example, see *Saylor* v. *Enterprise Electric Co.*, 106 Or. 421, 212 Pac. 477. Now, however, the general pattern of interpretation of this unique Act has been established.

In interpreting the final "and generally" clause the following matters are no longer disputable. In *Coomer* v. *Supple Investment Co.*, 128 Or. 224, 274 Pac. 302, the court held that the Act applied to an *employee* of a customer of the defendant who was lawfully using the defendant's appliances.

The Coomer case followed the case of *Rorvik* v. *North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163. Coomer, *supra*, 228. Of the Rorvik case the court has said:

> "In Rorvik v. North Pacific Lumber Co., 99 Or. 58 (190 Pac. 331, 195 Pac. 163), we ruled that where an employee of one corporation employer is injured or killed by the failure of another corporation employer, although not an employer of the one injured or killed, to use the precaution required by the Employers' Liability Act, the employee or his beneficiary could maintain an action against the culpable employer under the provisions of the Employers' Liability Act."

The quotation continues:

> "The opinion in Clayton v. Enterprise Electric Co., 82 Or. 149 (161 Pac. 411), is authority for the same doctrine; and a statement in Turnidge v. Thompson, 89 Or. 637, 653 (175 Pac. 281), is an approval of the doctrine. It is not necessary at this time to re-examine the soundness of the doctrine mentioned; *for the decedent was not an employee of any employer.*" *Saylor* v. *Enterprise Electric Co.*, 106 Or. 421, 436, 212 Pac. 477. (Emphasis supplied)

The Saylor case itself applied the established constructional rule that the Act does not extend coverage to any person not "an employee of any employer." The court set up its problem there as follows:

> "If, however, the act with all its incidents governs no actions for damages except those brought by employees, then the judgment must be affirmed, *even though it is assumed that the decedent was engaged in work about the wire.*" Saylor, *supra*, 436. (Emphasis supplied)

Judgment for the defendant was affirmed and so the case must be understood as holding that the statute protects only employees or their substitutes by reason of death. The court in its analysis of the Act considered the phrase in the Act's title "actions by employees against employers."

> "There is ample room for saying that 'actions by employees against employers' means by employees and, in case of death, their substitutes speci-

> fied in the statute; but there is no room whatever for saying that the word 'employees' includes one who, though engaged in work, was not an employee of any person." Saylor, *supra*, 439.

The Rorvik case on which the court below relied was decided in accordance with the rule that the status of the injured person is an important consideration in applying the Act. By the time of the Rorvik case it had become well established that despite the broad language of the "and generally" clause that the Act did not extend coverage to the general public as such. *Turnidge* v. *Thompson*, 89 Or. 637, 175 Pac. 281. A sentence from the opinion in the Rorvik case neatly illustrates the restrictive interpretation which has been given this Act. The court after noting the intermingling of the employees of the two companies there states:

> "The vessel could not be loaded in any other manner, and while deceased was in one sense a 'member of the public', in another he was an employee engaged in working about or in the vicinity of machinery, found by the jury to be dangerous, which brings the case squarely within the rule announced in *Clayton* v. *Enterprise Electric Co.*, 82 Or. 149 (161 Pac. 411)." *Rorvik* v. *North Pac. Lumber Co.*, 99 Or. 58, 78, 190 Pac. 331, 195 Pac. 163.

In the Clayton case the pattern of the Rorvik case existed: an employee of one employer succeeded in holding a related employer, that is, a pumping plant em-

ployee held a power company liable under the Act. *Turnidge* v. *Thompson*, 89 Or. 637, 653, 175 Pac. 281; *Drefs* v. *Holman Transfer Co.*, 130 Or. 452, 455-6, 280 Pac. 505. Since the Clayton case the court has repeatedly followed its rule of construction limiting coverage to persons who were *employees* of some employer, and no case holding has gone beyond that. *Walters* v. *Dock Commission*, 126 Or. 487, 505, 266 Pac. 634, 270 Pac. 778; *McKay* v. *Pacific Bldg. Materials Co.*, 156 Or. 578, 592, 68 P. 2d 127.

This constructional pattern was recognized by this court in *Pacific States Lumber Co.* v. *Bargar*, 10 F. 2d 335, 336. This court further recognized that this construction is binding upon the federal courts. The issue here presented is then very narrow: does the Oregon Employers' Liability Act as construed by the Oregon courts require a determination that that workman is an *employee* of someone before the Act applies? Or stated in terms of this case's facts: is an independent contractor granted the benefit of the Act? In short, is the injured person's status one of the determinative facts of coverage by the Act?

The answer of the case law is clear and unambigous: the Act does not apply to indepedent contractors since it is restricted to persons who are employees of someone. *Helzer* v. *Wax*, 127 Or. 427, 272 Pac. 556, is controlling here. In that case the court held that a person there

employed to remove garbage was an independent contractor and therefore not entitled to the benefits of the Act. That case requires a holding here that the court below erred in refusing to instruct the jury that it must determine the employment status of the decedent before the Act could apply here and, specifically, in refusing to instruct the jury that the Act does not apply to independent contractors.

The charge of the court below deprived the appellant of its theory of defense since under the charge it was immaterial whether the decedent was an independent contractor or not. The words of the court in the Helzer case demonstrate that such a view is erroneous. After having analyzed the facts there to determine that the plaintiff there was an independent contractor, the court states:

> "We come now to the problem whether Section 6785, Or. L., which is a portion of the statute commonly referred to as the Employer's Liability Act, includes one who is an independent contractor. If employees only are protected by the requirements of the act, the plaintiff cannot recover; but, if an independent contractor, whose duties require their performance in an elevator shaft, or in the presence of an instrumentality which creates a risk, or danger, is also embraced within the protective features of the act, the plaintiff was possessed of a cause of action by virtue of it, if the requirements of the act were breached by the defendant.
>
> "3. It is well established that the plaintiff could

not recover under the act by virtue of his status as a member of the public: *Turnidge* v. *Thompson*, 89 Or. 637 (175 Pac. 281); *Malloy* v. *Marshall Wells Hardware Co.*, 90 Or. 303 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589); *Saylor* v. *Enterprise Electric Co.*, 106 Or. 421 (212 Pac. 477); *Brady* v. *Oregon Lumber Co.*, 117 Or. 188 (243 Pac. 96, 45 A.L.R. 812).

"We revert to the problem whether the foregoing circumstances accompanying his condition as an independent contractor place him in a more favorable situation." Helzer, *supra*, 433-4.

The court then turns to an analysis of the case law and distinguishes *Rorvik* v. *North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163, saying:

"The distinction between that case and the present lies in the fact that in the one the injured party was an employee, while in the present he is not. A later case to similar effect is *Walters* v. *Dock Commission* (Or.), 270 Pac. 778. Counsel for plaintiff submits that one who has achieved the office of captain of a vessel is upon a higher industrial and economic level than another whose task is the humble one of gathering rubbish. Our duty, however, is confined to the function of interpretation. If we are correct in our understanding that the purpose of the act was to protect only employees, counsel's argument loses its force when addressed to our ears. Our past decisions in expounding the meaning of the act make repeated use of the words employer and employee, and recovery has been uniformly confined to the latter. In *Clayton* v. *Enterprise Electric Co.*, 82 Or. 149 (161 Pac. 411), the deceased was an employee; the decision, however, contains words that might make it seem recovery was on a

different basis. A recent case restricting the operation of the act to the employee class is *Brady* v. *Oregon Lumber Co.*, 117 Or. 188 (243 Pac. 96, 45 A.L.R. 812).

> **"4-6. Since the plaintiff was not an employee, but was an independent contractor, we conclude that he could not maintain this action as a beneficiary under the act."** Helzer, *supra*, 437-8, (Last emphasis ours)

The Helzer holding has never been questioned, yet the court below asserted:

> "It is the nature of the work and not the technical legal status of the workman which controls." (R. 74)

If the court below is correct, it is difficult to understand why the Oregon court thought it necessary to devote over three pages of its eleven page opinion in the Helzer case to determining whether or not under the general principles of law the plaintiff was an independent contractor. (Pp. 430-433). Of the remaining eight pages of the opinion, about five are devoted to analyzing the law to reach the conclusion previously stated that the Act does not apply to the benefit of independent contractors. (Pp. 433-8).

If the distinction between an employee and independent contractor is purely formal, then a great many important distinctions in the law are formalities. The

difference between an employee and an independent contractor in the type of situations with which the Act deals is much more important than a distinction in such circumstances between a muncipal "quasi-officer" or "pseudo officer" and a municipal employee. *Asher* v. *City of Portland*, 133 Or. 41, 284 Pac. 586.

The charge of the court specified as an error is in part as follows:

> "Mention has been made of the fact that Dean Hutchens was not employed by the defendant but by W. R. Francis, or that he was self-employed. In this connection I instruct you that his employment status and the contractual relation between Francis and Dean Hutchens, or between Francis and the defendant, in so far as any issue in this case is concerned is immaterial, and Dean Hutchens was or was not entitled to the benefits and protection of the Employers' Liability Act solely on the basis of whether the work which he was doing at the time and the place of the accident involved risk or danger." (R. 298)

The error of the charge is clearly shown by a comparison with a statement of the court in the Helzer case. In the early part of that opinion, before having announced its conclusion that the Act does not apply to independent contractors, the court stated:

> "If employees only are protected by the requirements of the Act, the plaintiff cannot recover; *but, if an independent contractor*, whose duties require their performance in an elevator shaft, or in the

presence of an instrumentality which creates a risk, or danger, *is also embraced within the protective features of the act*, the plaintiff was possessed of a cause of action by virtue of it, if the requirements of the act were breached by the defendant." *Helzer v. Wax, supra*, 433 (Emphasis supplied)

It is apparent that the court below has restricted its charge to only one element of the law: did the decedent's work involve risk or danger? The court in its charge ignored the other element of the law: the status of the decedent as employee or independent contractor. Defendant's requested instruction XV states that requirement simply and clearly. Since *Helzer* v. *Wax*, 127 Or. 427, 272 Pac. 556, is law, some such instruction had to be given. None was, and the appellant was thereby deprived of its theory of defense.

SPECIFICATION OF ERROR III

The District Court erred in refusing to admit in evidence a ruling of the Oregon State Industrial Accident Commission which was as follows:

"That the claim of Mrs. Kathleen Hutchens, widow of the deceased, Hollis Dean Hutchens, should be and the same is hereby rejected as there is no evidence that said deceased, Hollis Dean Hutchens, was employed subject to the provisions of the Oregon Workman's Compensation Law at the time of said accidental injury causing his death." (Defendant's Exhibit 4, see also R. 35)

The grounds urged at the trial to the exclusion of the said evidence were as follows:

"Mr. Powers: * * * I want to offer in evidence that ruling from the Industrial State Accident Commission.

"Mr. Babcock: To which we will object, your Honor, and if there is going to be argument.—

"The Court: Objection sustained.

"Mr. Powers. I see." (R. 288-9)

* * *

"Mr. Powers: I wanted to put in all the exhibits, and I mentioned them one by one, and I assume I have an exception to the ones not admitted?

"The Court: You have." (R. 289-90)

Said grounds against exclusion had previously been presented in great detail in pre-trial conference in connection with allowing appellant to plead said ruling in the pre-trial order:

"The Court: But the question is, may something be included in the pre-trial order that is absolutely inadmissable at the trial? Why would the determination by the Industrial Accident Commission have any bearing upon this proceeding?

"Mr. Powers: Well, they have filed in here an election with the Industrial Accident Commission that is in the court records, and they are proceeding on that basis, so it has all the bearing in the world here.

"The Court: You mean to say that if the State Industrial Accident Commission holds that Hutchens

was an independent contractor that that is binding upon him in this proceeding or is any evidence?

"Mr. Powers: I think it would be binding unless he took an appeal from it.

"Mr. Babcock: May I call your Honor's attention—

"Mr. Powers: I think it would be binding unless there is an appeal. They have the right of appeal. Whether they have taken an appeal—we don't know what they do or propose to do.

"Mr. Babcock: May I call your Honor's attention to the provisions and the language of the Code in 120-1729 where it is stated that in any third party action bought pursuant to the provisions of this Act the fact that the injured workman or his beneficiaries are entitled to or have proceeded shall not be pleaded or admitted. I think under the provisions of the Code it is clearly inadmissable.

"Mr. Powers: This is in the nature of a supplemental pleading. You have stated what you contend, and it has been held that these determinations of the Accident Commission become binding on the Court if there is not an appeal taken from them. I am not so sure about Oregon, but I do know there are cases in Oregon.

"The Court: Their act is considerably different from ours, isn't it?

"Mr. Powers: It is different, but the administration of it is probably the same. It proceeds as an administrative body. In that respect it is similar, very similar. It certainly can't prejudice anybody to have it in there.

"The Court: Well, I don't think it should go in there. I think if you want to under your contentions of law that it might go in if it goes in any place.

"Mr. Powers: How would we prove it? Suppose we want to make a showing, an offer of proof. The contentions of law I think should be determined from what your proof is, and there are a good many. As I started out, there are a good many things I don't think should be in here as far as the plaintiff's contentions are concerned, and I say since they put them in I have got to answer them, and I have answered them, and to let him say who was complying with the safety rule, and so on, and that he was an employee—now, in face of the fact that it has actually been determined by the Accident Commission that he was an independent contractor—I don't see how I could just sit silently by.

"The Court: Well, I—

"Mr. Babcock: It was determined by the Commission he was an independent contractor in any event, but if he wanted to contend that, that is his contention, but I think it is immaterial.

"Mr. Powers: I don't know what they did. They held he was not an employee and his only other possible status would be an independent contractor. Now, what do you contend?

"Mr. Babcock: I don't contend, except that that fact is entirely immaterial to this proceedings.

"Mr. Powers: You were there and we weren't.

"Mr. Babcock: If you want a copy of the Commission's order I should be glad to make it available to you.

"Mr. Powers: Has it become final?

"Mr. Babcock: Yes; it is under appeal.

"Mr. Powers: You have taken an appeal?

"Mr. Babcock: Yes.

"The Court: What is the order?

"Mr. Babcock: The order is that the claim of Kathleen Hutchens, widow, should be and the same is hereby rejected, and there is no evidence that said the deceased was employed subject to the provisions of the Oregon Workmen's Compensation Act at the time of said accidental injury causing his death.

"Mr. Powers: And you, of course, will stipulate that Francis was subject to the Workmen's Compensation Act at the time.

"Mr. Babcock: That's right.

"Mr. Powers: And you applied for compensation under the theory he was an employee of Francis?

"Mr. Babcock: That's right.

"Mr. Biggs: Isn't the official determination of an administrative body admissible in evidence, though not binding on the Court, where the claimant and his working situation is the very same matter before the administrative body as is before the Court? Isn't the administrative body's decision admissible in evidence for whatever weight the Court may give it, and don't Court incline to give considerable weight to such rulings? That is the general rule. I don't know why it wouldn't be admissible.

"Mr. Babcock: That isn't my understanding of it, and, in addition, here, you have the actual provisions of the Code that that fact isn't to be brought into the case as far as the jury is concerned—at least whether he is or may be entitled to compensation under the State Act.

"Mr. Powers: We would like to have it stay in if we can.

"The Court: I think I am going to let it stay in despite the fact that I have grave doubts as to whether or not you may introduce any evidence on it, but I think the pre-trial order should contain all of the contentions of the parties." (R. 96-9)

The above specification of error covers the questions raised by Appeal Point 3.

Point: A ruling by the Industrial Accident Commission as to decedent's employment status was admissible in this action as evidence of decedent's employment status.

The appellant was entitled to the application of the most favorable rule as to admission of evidence whether it was the rule in the Oregon courts or in the courts of the United States. Rule 43 (a), Civ. Proc. R.; *Reck* v. *Pacific Atlantic Steamship Co.*, 180 F. 2d 866.

One of the Washington cases referred to by counsel for appellant at the pre-trial conference is: *Prince* v. *Saginaw Logging Co.*, 197 Wash. 4, 84 P. 2d 397. In that case plaintiff's claim for workmen's compensation was rejected by the Department of Labor and Industries. One reason for the rejection was the finding that at the time of injury claimant was not in the course of employment. Claimant accepted the decision and instituted a negligence action against his employer. Among the defenses advanced was that he was in the course of his employment and therefore barred by the workmen's compensation law.

Plaintiff relied on the administrative decision. The superior court in a memorandum decision asserted that

the injury occurred in the course of his employment and that the administrative decision to the contrary was not res adjudicata as to the employer and hence dismissed the action. The supreme court reversed holding both the employee and employer bound by the administrative determination. In the case at bar the court refused to even admit the administrative ruling in question. See also *LeBire* v. *Dept. of Labor & Industries*, 14 Wash. 2d 407, 128 P. 2d 308.

In *Franzen* v. *E. I. DuPont De Nemours & Co.*, 146 F. 2d 837, a witness' deposition before a state Workmen's Compensation Board was held properly admitted. In that case suit was brought in the New Jersey Federal District Court under the Employer's Liability Laws of Louisiana. The deposition had been taken in connection with plaintiff's claim before New Jersey Workmen's Compensation Board for compensation under the law of New Jersey.

In *The Abangarez*, 60 F. 2d 543, the court held that the findings of a board of local inspectors as a collision between a steamship and a submarine were admissible as being in the nature of public documents and therefore within that exception to the hearsay rule. In that case the court had to determine which vessel was at fault in the collision yet it admitted the findings the administrative board on the same question.

The analogy to the case at bar is clear since here under appellant's theory the court had to instruct the jury that the employment status of the decedent had to be determined before the Oregon Employers' Liability Act would apply. In fact, the court refused to properly instruct the jury; and the text of the rejected industrial accident ruling shows that this failure of the court to properly instruct the jury as to employment status was prejudical error.

In *United States* v. *Mid-Continent Petroleum Corporation*, 67 F. 2d 37, the court held that enrollment records of Indian tribes made by a quasi-judicial tribunal were admissible in a suit involving title to certain oil bearing Indian land. Such records involved an adjudication as to what persons were members of the tribe. This adjudication was admitted not to show the quantity of Indian blood, but the relationship of the parties to the Indian who had died owning the oil land in litigation. There is an analogy between this admission of a quasi-judicial commission's determination of family relationships in a lawsuit involving land title, and the admission of a quasi-judicial commission's determination of employment status in a personal injury suit under a statute generally protecting workingmen.

The problem here presented is whether an administrative determination of a fact contested in a regular

lawsuit arising under a distinct statutory provision is admissible in that regular lawsuit. The answer is yes, according to a series of cases arising out of the interaction of the World War I war risk insurance and compensation or pension statutes.

In the case of *McGovern* v. *United States*, 294 Fed. 108, *writ of error dismissed in* 267 U.S. 608, 69 L. Ed. 812, 45 S. Ct. 351, *affirmed in* 299 Fed. 302, *writ of error dismissed in* 268 U.S. 708, 69 L. Ed. 1169, 45 S. Ct. 515, the plaintiff claimed that he had total permanent disability within the meaning of section 400, Act Oct. 6, 1917, 40 Stat. 409. (Article IV, War Risk Insurance.) Plaintiff sued to enforce the contract of insurance; and the court held that the determinations and actions of the Veterans' Bureau were admissible though such determinations "may have been more in relation to compensation than to insurance" since "the import of the term 'total permanent disability' is like in both aspects." (Apparently the compensation (pension) proceedings had arisen under Article III, Act of Oct. 6, 1917, 40 Stat. 405.)

The cases of *United States* v. *Vance*, 48 F. 2d 472, and *United States* v. *Smith*, 55 F. 2d 141, also involved the use of compensation disability ratings in a regular lawsuit to enforce a war risk insurance policy. See also *United States* v. *Doughterty*, 54 F. 2d 721. In first two

cases the Veterans' Bureau's compensation (pension) ratings were held admissible on the question of the lapse of the policy under section 305, World War Veterans' Act, June 7, 1924, 38 U.S.C.A. sec. 516. See Appendix for pertinent text.

The leading case, *McGovern* v. *United States, supra,* was criticized in *Third Nat. Bank & Trust Co.* v. *United States,* 53 F. 2d 599. Whether or not that criticism is sound in view of the trend of law in evidence on this point, it is to be noted that *United States* v. *Smith, supra,* was decided by this court after the Third National Bank case. In a later case, *Quinn* v. *United States,* 58 F. 2d 19, the Third Circuit held that the Veteran's Bureau's disability ratings and other rulings and findings of the directors and bureau were admissible to show service connection of the plaintiff's disabilities.

The analogy of these veterans' cases to the case at bar is clear and obvious. Both the Oregon Employers' Liability Act and the Workmen's Compensation Act relate generally to the injuries of workmen. The Oregon Industrial Accident Commission determined that the decedent was not covered by the Workmen's Compensation Act and the inference is clear that he was not an employee but an independent contractor. Appellee's counsel conceded that decedent was determined by the Commission to be an independent contractor. (R. 98)

Under the circumstances of this case there were no other possibilities. The Act is generally restricted to workmen of covered employers, and the term workman is defined as "any person who shall engage to perform his or her services, subject to the direction and control of an employer." O.C.L.A. 102-1703, § 102-1728.

The ruling was an official record of the Industrial Accident Commission and should have been admitted. O.C.L.A. 102-1773 provides in part:

> "The commission shall have full power and authority to hear and determine all questions within its jurisdicton. Whenever the commission has made any order, decision or award pertaining to any claim, it shall promptly serve the claimant with a copy thereof by mail * * * "

According to Wigmore the general rule as to official records is:

> "*Wherever there is a duty to record official doings, the record thus kept is admissible.*" * * *
>
> * * *
>
> "Further, it may safely be laid down, as a general principle, that *wherever there is a duty to do,* then there is *also an implied duty to record* the things done." 5 Wigmore, *Evidence,* (3rd Ed. 1940) sec. 1639.

Under that jurisdiction the Commission heard and rejected the claim of the decedent's widow for death

benefits. Its ruling in writing regularly made should therefore have been admitted.

To have admitted this evdence would have been to conform to the trend in the law as shown by Rule 515 of the American Law Institute Model Code of Evidence. (Text of rule set out in Appendix.) The Workmen's Compensation statute does not specifically privilege the ruling from disclosure. Here the court below should have found that the writing was made by the Commission in performance of its office, and that it was the function of the Commission to investigate the "condition" of the decedent's employment status and "to make findings or draw conclusions about it." A.L.I. Rule 515 was considered with approval in *Vanadium Corporation v. Fidelity & Deposit Co.*, 159 F. 2d 105, where the court approved admission of certain interdepartmental communications showing departmental willingness to approve the sale of certain mining leases.

Finally, it is well established in Oregon that expert opinion evidence may be received on the very issue before the jury, *Schweiger v. Solbeck*, 52 Or. Adv. Sh. 611, 626, 230 P. 2d 195. In Washington in a case arising under its factory act the plaintiff complained that he had been injured by certain industrial gases. A cause of the injury was alleged to be poor ventilation. The court held it

proper to admit the opinion reports of the factory inspectors on that question. *Grant v. Fisher Flouring Mills Co.*, 190 Wash. 356, 68 P. 2d 210. These cases suggest that the ruling of the accident commission here should have been received in evidence.

SPECIFICATION OF ERROR IV

The District Court erred in refusing to give defendant's requested instruction No. XXIV which totidem verbis was:

> "I instruct you that the Logging Safety Code of the State of Oregon prohibits anyone from going between a load of logs and a brow log and therefore if you find in this case that the deceased went between a log load and the brow log then he would be in violation of this provision of the safety code and you are further instructed that a violation of this provision of the safety code would be negligence as a matter of law and if you further find that this negligence was the sole proximate cause of the accident and death then in that event your verdict would be for the defendant and against the plaintiff." (R. 48)

The grounds of objection urged at the trial to the District Court's refusal to give said instruction were:

> "MR. POWERS: Well, then, we would like an exception, if the Court please, to the Court's failure to give requested instruction No. 23, * * *, and also exception to the Court's refusal or failure to give requested instruction No. 24, which also has to do with

the safety code and which forbids a person from going between the truck and the brow log." (R. 318)

The said specification of error covers questions raised by Appeal Point 5.

Point: Violation of the Logging Safety Code of the State of Oregon is negligence as a matter of law in Oregon.

It was an agreed fact set out in the pre-trial Order that:

> "Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log." (R. 10)

The nature of a logging truck is such that all except the front end of the log load is on the trailer. Under the agreed facts it is then clear that the decedent was killed while between his log load and the brow log of the dock.

To be there was a violation of section 17.15 of the Logging Safety Code of the State of Oregon:

> "Men shall not go between the brow log and a load of logs." (Plaintiff's Exhibit 18, P. 76)

Another section of the Logging Code, section 17.13, makes it clear that there is no exception to the first

rule for a log hauler unloading his logs. That section states:

> "Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading." (Plaintiff's Exhibit 18, P. 76)

In the unloading here concerned, the load of logs were to roll towards the brow log, yet the decedent went into that forbidden area.

The agreed facts show a violation of the Logging Safety Code. The question presented by the specification of error is then: what is the legal effect of a violation of the Logging Safety Code?

The introduction to the Code states:

> "The contents of this book are a part of the safety laws of Oregon, the enforcement of which becomes the responsibility of the Accident Prevention Division of the State Industrial Accident Commission" (Plaintiff's Exhibit 18, P. 1)

The enforcing agency thus construes this Code as a "safety law." That interpretation is entitled to serious consideration. *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 512, 286 Pac. 527. See Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon*, 29 Or. L. Rev. 1, 8-11 (1949).

The Oregon court agrees that the Logging Safety

Code has the effect of law. In the case of *Varley v. Consolidated Timber Co.*, 172 Or. 157, 165, 139 P. 2d 584, after quoting at length from the Logging Safety Code, the court said:

> "The foregoing rules and regulations have the effect of law §102-1241, O.C.L.A.; and any violation thereof is punishable by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than six months or by both such fine and imprisonment, in the discretion of the court: §102-1243, O.C.L.A."

O.C.L.A., §102-1241, provides:

> "Every order of the commission, general or special, its rules and regulations, findings and decisions, made and entered under the safety provisions of this act shall be admissible as evidence in any prosecution for the violation of any of the said provisions and shall, in every such prosecution, be conclusively presumed to be reasonable and lawful and to fix a reasonable and proper standard and requirement of safety, unless, prior to the institution of the prosecution for such violation or violations, proceedings for a rehearing thereon or a review thereof shall have been instituted as provided in section 102-1238, and not then finally determined."

The general rule is that violations of such regulations as the Logging Code is some evidence of negligence. 1 Shearman and Redfield, *Negligence*, (Revised Ed. 1941) sec. 18. In Oregon the statute has gone further and stated that the Commission's general safety rules are

"conclusively presumed" to be "a reasonable and proper standard and requirement of safety."

This conclusive presumption is not restricted to prosecutions under the provision of that particular act. *Varley v. Consolidated Timber Co., supra.* The Varley case was an ordinary negligence action for injuries yet the court stated that in that case the Logging Code had the effect of law. (P. 165) Compare *Kuntz v. Emerson Hardware Co.*, 93 Or. 565, 577, 184 Pac. 253. (Certificate of Labor Commissioner as to compliance with Factory Act held admissible to show compliance with Employers' Liability Act.)

Since there is a conclusive presumption that the Logging Code sets the proper standard of safety, falling short of that standard must be conclusively presumed to be negligent. The agreed facts show that the decedent failed to conform to the standard of safety required by the Logging Code. That failure was negligence as a matter of law.

The Oregon court in *Fitzgerald v. Oregon-Washington R. & Nav. Co.*, 141 Or. 1, 13, 16 P. 2d 27, an Employers' Liability Act case, has taken a very strong position:

> "8. A violation of a statutory mandate for the safety of workmen constitutes negligence without regard to the applicability or non-applicability of the penal clause of such statute."

The safety statute there involved, Section 49-1202, Oregon Code 1930, (presently O.C.L.A. § 102-1202) relates to the lighting of places of employment.

That is the position the appellee took at the pretrial conference:

> "The Court: What is your view as to whether or not the violation of the Safety Code provision or any administrative ruling would be negligence or is evidence of negligence? Is there any dispute about that?
>
> "Mr. Babcock: It is our understanding and our position that it does constitute negligence per se." (R. 105)

The remainder of the requested instruction to the effect that if the jury should find this negligence was the sole proximate cause of the accident then the verdict should be for the defendant is within the bounds of the instruction approved in *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223. See also *Vanderflute v. P.R.L & P. Co.*, 103 Or. 398, 205 Pac. 551.

The trial court's refusal to give defendant's requested instruction XXIV was highly prejudicial to the defendant since the defendant was thereby deprived of an important defense. If the sole proximate cause of the accident was the decedent's negligence as a matter of law in venturing where the Logging Safety Code forebade

him to be, then it is obvious that the plaintiff cannot recover. The refusal to give the requested instruction prevented the jury from finding that admitted actions of the decedent which the State of Oregon has formally declared to be negligent were the sole cause of his own death.

SPECIFICATION OF ERROR V

The District Court erred in refusing to give defendant's requested instructions No. I through IX which totidem verbis were:

I.

"The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (1) which appears on page 8 in the pretrial order. The E. L. A. is designed to require safe appliances and devices and this specification would not be a violation of the Act. There is no evidence to support the claimed violation and moreover plaintiff seeks to recover solely under the Act and the Act itself sets the standard of care required. A violation of some other law or code as claimed here can not be ingrafted upon the E. L. A. In short, the provisions of the Act cannot be enlarged; the remedies are entirely different. The E. L. A. strips the employers of his defenses; the other law does not.

II.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (2) for the reasons stated above with respect

to specification of negligence (1); and further, there is no evidence that this would be a violation of the E. L. A. and there is no requirement by the Act at all that signals should be given by certain designated persons.

III.

The Court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (3). There is no evidence to support a violation of the E. L. A. with respect to this specification. There is nothing in the Act to require any particular number of workmen. The contract and other evidence shows that it was the obligation of the Logger to deliver the logs in the water. This specification of negligence is in part a repetition of specification of negligence (1).

IV.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (4) for the same reasons stated with respect to withdrawal of plaintiff's specification of negligence (1).

V.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (5). First for the reason that there is no evidence under this specification to constitute a violation of the E. L. A. and no evidence to support any lack of notice to the decedent as it was his duty to give the signal to move the log and to take a safe place while that operation was being carried on.

VI.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of neg-

ligence (6) for the same reason stated with respect to specification of negligence (1); and moreover, the Sawmill Safety Code could have no application in this matter in that there was no sawmill involved.

VII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (7) for the reason there is no evidence to support a violation of the E. L. A. That this specification is merely a repetition of other specifications above.

VIII.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (8) in that there is no evidence to support a violation of the E. L. A. and further for the same reasons as expressed above particularly with respect to the request for the withdrawal of specification of negligence (1).

IX.

The court is requested to withdraw from the consideration of the jury plaintiff's specification of negligence (9) on the ground and for the reason that this specifies a breach of the common law and not a breach of the E. L. A. There is no evidence under this specification of negligence to show any violation of the E. L. A." (R. 40-3)

The grounds of objection urged at the trial to the District Court's refusal to give the said instructions were:

"MR. POWERS: May it please the Court, the defendant would request exception, if the Court please,

to the failure to give defendant's requested instructions No. 1 through 9. They were requests that the specifications of negligence be withdrawn from consideration of the jury, and the reasons stated as to why we thought they should be withdrawn are stated in the requested instructions, your Honor, so the reasons given there I will repeat here without reading them because they do appear there." (R. 316-7)

"THE COURT: You may have your exceptions." (R. 320)

Said specifications of error covers questions raised by Appeal Point 6.

SPECIFICATION OF ERROR VI

The District Court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict. Said motion was made in the following form:

"Comes now defendant C. D. Johnson Lumber Corporation and moves the court for the entry of judgment in its favor notwithstanding verdict of the jury on the grounds and for the reasons following:

(1) There is no specification of negligence in the pre-trial order which would constitute violation of the Employers' Liability Act of the State of Oregon.

(2) There is no competent evidence in this case to support a verdict in favor of the plaintiff for any claimed violation of the Employers' Liability Act.

(3) The only possible evidence of negligence in this case would be for common law negligence or possibly a breach of some Oregon statute which is not part of the Oregon Employers' Liability Act.

(4) There is no evidence in this case to show any violation on the part of this defendant of the Employers' Liability Act in that there is no evidence of any failure to use every device, machinery and other apparatus as required by the Oregon Employers' Liability Act.

(5) There is no evidence showing that the status of the decedent at the time and place of his death was such as to bring him within the class of persons entitled to protection under the Employers' Liability Act.

Wherefore, defendant asks that judgment now be entered in its favor and plaintiff's complaint dismissed." (R. 57)

The District Court entered an order denying motion for judgment notwithstanding the verdict which omitting formal parts was totidem verbis:

"It Is Hereby Ordered that the said Motion for Judgment Notwithstanding Verdict of Jury be and the same hereby is denied." (R. 69-70)

Said specification of error covers questions raised by Appeal Point 1. (Specifications of Error V and VI raise similar questions of law and are hence argued together here.)

Point: Decedent was killed in an unsafe place where he was forbidden by law to be and therefore it can not be claimed that the appellant was negligent in failing to provide him with a safe place to work since a safe place was available to him.

Specification VI contends that the Oregon Employers' Liability Act was inapplicable under the circumstances of this case and therefore there could be no competent evidence of any violation of the said Act. Specification V contends that it was error for the Court to refuse to withdraw from the consideration of the jury all of plaintiff's specifications of negligence on the ground that there was no evidence to support any of the said specifications as alleged violations of the Act.

The ultimate question presented by these two specifications of error is: was there any violation of the Act by the defendant when the decedent placed himself in an unlawful place and was killed there while doing an unlawful act? In short, was there any failure on the part of the defendant to provide the decedent with a safe place to work?

The decedent was provided with a safe place to work which he left for an unsafe place where he was forbidden by law to be. Defendant moved to withdraw all specifications of negligence under the Act, leaving only the general statement that defendant failed "to furnish

the decedent, Dean Hutchens, with a safe place of employment and failed to use every device, care and precautive precautions practicable to protect the safety of the decedent." (R. 18) The statement as to precautions is a paraphrase of the Act (O.C.L.A. §102-1601), and only indicates the standard of care required as to providing a safe place to work. This Court has treated the requirement of a safe place to work under the Act and necessity of taking precautions under the Act as equivalent expressions. *Crown-Willamette Paper Co. v. Newport*, 260 Fed. 110, 113.

The Oregon court concurs:

> "The requirements of the Act are simply expressions in detail of the duty thus enjoined (provision of reasonably safe place to work), and are not satisfied with less than continual vigilance according to the standard of the enactment." *Dickerson v. Eastern & Western Lumber Co.*, 79 Or. 281, 287, 155 Pac. 175. (Insertion added)

If a safe place to work is furnished, the specified requirements of the Act are met. Any alleged necessary precautions are immaterial if a safe place to work is in fact furnished, and hence evidence with respect to such precautions is not competent to show any violation of the Act. This view is supported by authority previously cited, and it is also supported by reason. It is easy to see that there is no violation of the Act by the employer if

an employee deliberately inserts his hand into a machine by pushing it around a properly designed guard. It should be no less clear that there is no violation of the Act by the employer if the employee deliberately violates rules laid down for safe operation.

DECEDENT WAS KILLED IN AN UNLAWFUL PLACE DOING AN UNLAWFUL ACT

The rule here is laid down, not simply by the employer, but by the State of Oregon acting through the Industrial Accident Commission. The rule here is laid down by the Oregon Logging Safety Code which prohibits men from going between the brow log and a load of logs. That prohibition has the effect of law. *Varley v. Consolidated Timber Co.*, 172 Or. 157, 165, 139 P. 2d 584.

O.C.L.A. §102-1236 required the decedent to comply with that rule:

> "Every employer, employe and other person shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in connection with the matters herein specified, or in any way relating to or affecting safety of employments or places of employment, * * *."

In fact, he did not comply with that rule. It was an agreed fact that the decedent was killed "while he was

in a position between the trailer of the truck and the brow log." (R. 10) Testimony at the trial sustains the proposition that the decedent went between the brow log and his log load. (R. 128-9) Irrespective of any question of negligence the decedent committed an *unlawful* act in going between the load and the brow log.

For that act the decedent could have been punished by a fine of not more than $100.00, or by imprisonment in the county jail for not more than six months; or by both fine and imprisonment:

> "Every violation of the provisions contained in sections 1, 2, and 3 of this act (§§ 102-1228—102-1230, herein), or any part of portion thereof, by any person, firm or corporation is a separate and distinct offense, and, in case of a continuing violation thereof, each day's continuance thereof shall constitute a separate and distinct offense. Any person violating any of the provisions contained in sections 1, and 3 of this act (§§ 102-1228—102-1230, herein), or any part or portion thereof (or any lawful order, rule or regulation of the commission adopted or promulgated in accordance with the provisions of this act shall be punished by a fine of not more than $100, or by imprisonment in the county jail for not more than six months; or by both such fine and imprisonment in the discretion of the court. Justice and district courts shall have concurrent jurisdiction with the circuit court for the prosecution and punishment of all crimes committed pursuant to or contrary to the provisions of this act." O.C.L.A. § 102-1243.

The decedent could have also been fined and imprisoned for another act. If the decedent had any business at all being between the load and the brow log, it was to do an unlawful act. The only business he might have had there was the release of his load. Yet section 17.13 of the Logging Safety Code provides:

> "Binders and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading." (Plaintiff's Exhibit 18, P. 76)

EFFECT ON RECOVERY OF BEING INJURED DOING AN UNLAWFUL ACT

The title of the Oregon Employers' Liability Act is as follows:

> "A BILL to propose by initiative petition a law providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law." *Turnidge v. Thompson*, 89 Or. 637, 643, 175 Pac. 281.

The court in that case states at page 651:

> "Moreover, since every act must have a title expressing the subject matter, the title necessarily becomes a part of the act and offers valuable help in construing the act and determining the legislative intent: *State v. Robinson*, 32 Or. 43, 46 (48 Pac. 357)."

One of the three main purposes of act is to provide for the safety of persons in relation to specified machinery or situations. The remaining two main purposes, defining the liability of employers and declaring what shall not be a defense, present certain similarities to the various workmen's compensation acts. Under those acts many cases have arisen concerning an employee's right to compensation when he is injured in a place where he is forbidden by a safety rule or statute to be. Although for most purposes the Oregon Employers' Liability Act is unique, this particular line of cases should be applied here because the problem is analogous. *McClaugherty v. Rogue River Electric Co.*, 73 Or. 135, 149, 140 Pac. 64, 144 Pac. 569.

The problem herein presented is created by the enactment in 1920, nine years after the enactment of the Oregon Employers' Liability Act, of a general safety statute authorizing the promulgation of industry safety codes having the force of law. O.C.L.A. § 102-1228—1251. The precise question is: does the failure of a workman to abide by a safety code having the force of law

under the 1920 statute relieve the employer of liability under the 1911 statute where the workman would not have been injured but for his violation of the safety code? That question is open, but compare *Kuntz v. Emerson Hardware Co.*, 93 Or. 565, 577, 184 Pac. 253, where a certificate of the Labor Commissioner as to compliance with Factory Act was held admissible to show compliance with the Employers' Liability Act.

In the case of *Fortin v. Beaver Coal Co.*, 217 Mich. 508, 187 N.W. 352, 23 A.L.R. 1153, a workmens' compensation case, a miner was killed jumping across the sump at the bottom of a shaft instead of passing around it as required by a mine safety statute and the court held that his dependents could not recover since he was guilty of a misdemeanor in jumping. That principle should be applied here because the Legislature in requiring employers to make operations safe by various devices would not have contemplated holding the employer for injuries incurred by workmen in violating other rules for safe operation made by the Legislature's representative, the State Industrial Accident Commission.

The integration of the 1911 safety appliance act with the 1920 safety code act should be even closer than a mine safety act with a compensation statute whose primary aim is compensation rather than safe operation.

The Oregon Employers' Liability Act is not only remedial, it is preventive. Its outstanding purpose is to protect employes from injury. *Smith v. Shevlin-Hixon Co.*, 157 F. 2d 51, 54.

The principle of denying recovery to a workman doing a forbidden act is also applied in Michigan where only the employer's instructions prohibited the act: entering a grain bin too soon after fumigating gas crystals had been placed there. The court said:

> "A prohibited risk, when voluntarily assumed, with knowledge of easily apprehended fatal consequences is not an incident of employment, and an injury, so received, is not an accident arising out of and in the course of employment." *Waldbauer v. Michigan Bean Co.*, 278 Mich. 249, 254, 270 N.W. 285.

Many cases might be cited to illustrate the principle that doing an act prohibited either by employer's rule or by statute may bar a compensation award; the following are some of the more closely analogous cases: *Walcofski v. Lehigh Val. Coal Co.*, 278 Pa. 84, 122 Atl. 238 (recovery denied where miner entered section of mine marked "gas" contrary to mine safety law); *Jenczewski v. Aluminum Co.*, 199 App. Div. 156, 191 N.Y.S. 392 (dicta that no award could be made if workman was injured when contrary to orders he entered a prohibited pot-line area); *Joseph Fournier's Case*, 120 Me. 236, 113

Atl. 270, 23 A.L.R. 1156 (workman injured when being hoisted contrary to instructions denied compensation).

The question of the effect of going into or remaining in a prohibited place is annotated at: 23 A.L.R. 1172, 26 A.L.R. 167, 58 A.L.R. 201, 83 A.L.R. 1217, and 119 A.L.R. 1413. Each case is of course set in a statutory context of whether, for example, the forbidden act is "intentional or wilful misconduct" or "arises out of and in the course of the employment," but these specific provisions do not prevent the principle announced from being applicable in the case at bar. That principle is: conduct made criminal by law is a bar to compensation for injuries incurred as a result of such conduct.

The words of the Oregon court in regard to the interrelationship of parts of the Oregon Employers' Liability Act, state the controlling principle here:

> "4. It seems evident that one who has violated a statutory duty can not have a statutory right of action to secure redress." *Schmidt* v. *Multnomah Opr. Co.*, 155 Or. 53, 67, 61 P. 2d 95.

DECEDENT WAS FURNISHED A SAFE PLACE TO WORK

To summarize there was no competent evidence of any violation of the Oregon Employers' Liability Act in this case because the decedent was furnished a safe place to work. He could have stood clear of the log's path

as Witness Vincent did. (R. 119-120) An inspection of plaintiff's exhibits 3 through 7 and 13 through 14 will confirm the fact that places of safety were available to the decedent which he did not utilize. (R. 113-8) The plaintiff does not claim that there is any defect of equipment here. (R. 237)

The purpose of the Act is achieved when the workman is provided with a safe place to work; the specific requirements of the Act are only means to that end. Here a safe place to work was provided but the decedent did not use it, and the Oregon Employers' Liability Act does not go so far as to require the employer "to supervise every detail of the labor of each employee in the ordinary course of work." *Van Norden* v. *Chas. R. McCormick Lumber Co.*, 17 F. 2d 568, 569.

The analogous case of *Jackson* v. *Oregon Lumber Co.*, 152 Or. 200, 52 P. 2d 189, arising under the Oregon Employers' Liability Act, supports that conclusion. There the decedent log truck driver was killed on an unloading dock apparently after he had loosened the chains holding his load of logs. (P. 201) The unloading dock there was cramped, being constructed by planking one track of a narrow gauge railway. In that case plaintiff also alleged a failure to furnish a safe place to work. The court held that there was no evidence that the failure to furnish a smooth and level place to unload the logs

was the proximate cause of deceased's death. If an unloading dock is an unsafe place to work as plaintiff seems to contend, then it is noteworthy that the Oregon court did not so intimate when the plaintiff's specific allegation of a rough unloading place was found to be unsupported in the Jackson case.

SPECIFICATION OF ERROR VII

The District Court erred in refusing to give defendant's requested instruction No. XIX which totidem verbis was:

> "I instruct you that if you find from the evidence that the truck driver was in charge of the unloading operation, then, in that event, it was up to the truck driver to see that the provisions of the E.L.A. were complied with." (R. 45)

The grounds of objection urged at the trial to the District Court's refusal to give the said instruction were:

> "Mr. Powers: * * * And we ask for an exception, if the Court please, to the Court's refusing to give requested instruction No. 19 of the defendant. I am not sure—I don't think that you told the jury that if the driver was in charge of the truck and the unloading operations that then the Act would not be applicable because he himself would have the responsibility for seeing that the provisions would be enforced.

"The Court: Mr. Babcock took exception to that because he thought I did give it. (R. 317-8)

* * *

"The Court: You may have your exceptions. (R. 320)

Said specification of error covers questions raised by Appeal Point 4.

Point: The decedent was in charge of the unloading operation within the meaning of the Employers' Liability Act and hence was responsible for compliance with the Act.

The requested instruction presented a theory of defense grounded in the words of the statute O.C.L.A. 102-1603 provides:

"It shall be the duty of owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be."

This court has declared of this section:

"As will have been seen, section 6787 of the Oregon Laws expressly declares it to be the duty of 'own-

> ers, contractors, sub-contractors, foremen, architects, or other persons having charge of the work' in question to see that the Employers' Liability Act is complied with. That duty is by the statute distinctly placed upon each of those specifically mentioned, and all other persons having charge of the particular work, in precisely the same way and to precisely the same extent. Neither the owners nor the superintendent are by statute made any more responsible for the construction or operation of the particular structure in question than the foreman. The duty so imposed upon each can no more be delegated by the one than by the other. Such being the statute of the state, the courts are bound by it." *Marks* v. *Bauers*, 3 F. 2d 516, 518, *cert. den.* 268 U.S. 704, 69 L. Ed., 1167, 45 Sup. Ct. 639.

In that case the foreman of a rock-crushing plant was denied recovery because he was a person in charge and hence responsible for seeing that the requirements of the Act were complied with. The only question presented here is whether or not the decedent truck driver was one of those contractors "or other persons having charge of the particular work" within the meaning of the statute. The refusal of the requested instruction was thus error unless it can be said as matter of law that the decedent Hutchens was not in charge of the unloading operation in this case. In view of the Agreed Facts set out in the Pre-Trial Order it can not be so held.

Paragraph III of the Agreed Facts states in part:

"The usual process in unloading a truck was as follows: One end of a sling line was anchored to the brow log and the other end left free. Log trucks were driven to a place alongside the brow log being used and spotted in position by a signal from the crane engineer. In unloading the trucks the truck driver took the free end of the sling line and placed it under the logs to be unloaded, then attached it to the lifting crane. When the line was so attached, the engineer operating the crane took the slack out of the line. The truck driver then made his load ready for dumping and gave a signal to the crane enginer to hoist the log." (R. 9-10)

Paragraph IV of the Agreed Facts states:

"On August 19, 1949, the deceased, Dean Hutchens, was the driver of a logging truck delivering logs to said dock and was engaged in log unloading operations near said brow log. The truck being unloaded consisted of one large log approximately 40 feet long and 52 inches in diameter. Dean Hutchens spotted the truck under the unloading dump at a point indicated by the crane engineer. He thereupon got out of the truck and pulled the sling line over the reach and under the log and fastened the end of it to the hook on the unloading crane. Deceased was killed by being struck by the log as it was being unloaded from the truck while he was in a position between the trailer of the truck and the brow log." (R. 10)

From the Agreed Facts it appears that the log truck driver had the following duties in the unloading operation:

(1) handling the sling line and attaching it to the lifting crane, and

(2) making his load ready for dumping, and

(3) giving the signal to the crane operator to hoist the log.

The driver's control of the unloading operation is shown by the agreed fact that load could not be dumped until the driver gave the signal. The load was his, and it was his responsibility to unload it. He was not a carpenter obliged to obey orders or a bucker whose sole duty it was to saw trees where they had been marked. *Moen* v. *Aitken*, 127 Or. 246, 271 Pac. 730; *Yovovich* v. *Falls City Lumber Co.*, 76 Or. 585, 149 Pac. 941.

His situation as a contract log hauler was similar to that of the contract timber faller involved in the case of *Robbins v. Irwin*, 180 Or. 667, 178 P. 2d 935. In that case the court held that the trial court did not err in refusing to instruct the jury "that Joseph L. Peter, acting as a faller, as a matter of law is not one in charge or control of the work under the terms of the Employers' Liability Act" because the evidence tended to show that Peter and Wilcox (team of fallers) were in charge of the particular work in which they were engaged.

The evidence in favor of Peter being in control there should be compared with the evidence in favor of the

decedent being in control here. In the Robbins case the court summarized the evidence as follows:

> "There is evidence tending to prove that it was the duty of both Wilcox and Peter to determine what trees to fell and where to fell them; to make the areas or strips in which they were operating safe from various hazards; and to prepare runways or means of escape for themselves from the dangers of falling trees and to clear them of obstructions." (P. 669)

The court there held that this evidence was sufficient to prevent the court from saying as a matter of law that Peter was not in charge of the work even though his partner, Wilcox, was the head faller of the two-man team. Here the court below took the position that as a matter of law the decedent contract log hauler was not in charge of the unloading operation. Yet the only discretionary act in the otherwise mechanical process of unloading was done by the contract log hauler: he decided when the logs should be dumped. An automaton could have performed the rest of the operation, hence the contract log hauler must have been the contractor or other person "having charge of the particular work."

The various items of negligence specified by the plaintiff in the pre-trial order center around a lack of proper signals or warning, either by rules of operation,

additional workers, or by mechanical devices. The case of *Straub* v. *Oregon Electric Ry. Co.*, 163 Or. 93, 94 P. 2d 681, answers these contentions. That case involved the foreman of a railroad, and the Oregon Employers' Liability Act was assumed to apply. The Court said:

> "3. The plaintiff was the conductor and foreman of the switching crew, as alleged by him, and it was his duty to see that the work in which he and the crew were engaged was performed in a safe manner. In that capacity he had supervision over the engine crew engaged in switching operations. If the defendants were negligent in moving the cars from the spur track onto the lead track at an unnecessary and unusual speed, if they were further negligent in failing to stop the engine before the car on which the plaintiff was riding was moved over the switch, or if they were still further negligent in that the engine crew failed to keep a proper lookout as to conditions prevailing at the switch and failed to stop the engine, then such acts of negligence must of necessity be charged to the plaintiff as the vice-principal of the defendants.
>
> As already stated, the plaintiff alleged that it was his duty to see that the work in which he was engaged was performed in a safe manner. Therefore, it was incumbent upon him to make sure that there was sufficient clearance before causing the cars to be moved from the spur track onto the lead track. Under such circumstances, *he cannot complain of the failure of the defendants to warn him of the defective clearance, or their failure to provide a signal man at the switch.*" (P. 101) (Emphasis supplied)

The case at bar is stronger than either the Straub or the Robbins cases because of the contractual situation here existing. The decedent log hauler had no contract with the appellant but did have a log hauling contract with W. R. Francis, a logging contractor. Francis, in turn, had contracted with the defendant to do certain logging and deliver the logs to the defendant at Toledo. This contract was admitted in evidence and now is available to this court. (Defendant's Exhibit 1; R. 280, 82, 330) By its terms Francis was to be paid for logs delivered upon the basis of "net water scale" meaning "what logs are bought and sold on in the water." (R. 281) The logs were to be delivered in the sticks (raft boom sticks) by Francis. (R. 281) They were then scaled by the appellant. (R. 244-5)

The defendant contends that Francis was obliged by the contract to deliver the logs in the water, i. e. after unloading. (R. 248, 286) Supporting this interpretation of the contract is the fact that the defendant charged Francis for the proportionate share of the labor cost of the operation of the dump. This proportionate share was determined by the log footage Francis dumped there as compared with the total footage dumped by all such logging operators. The dump was operated as "a non-profit set-up" for the logging operators like Francis. (R. 283-285)

The fact that Francis was obliged to deliver the logs

in the water strongly supports defendant's contention that the decedent truck driver was in charge of the unloading operation. He had contracted with Francis to deliver logs for Francis, and his job was not finished until the logs were in the water. In view of the contractual relationship it was natural that the driver should be in charge of the unloading operation, and the agreed fact that he was to give the unloading signal confirms it.

SPECIFICATION OF ERROR VIII

The District Court erred in refusing to give defendant's requested instruction No. XVIII which totidem verbis was:

> "I instruct you that if you find that the crane engineer's wages were paid to the Logger or some deducted from the remittances made to the Logger on account of the crane engineer's wages while assisting in the unloading of the log in question, you could consider this along with other evidence as to whether the truck driver or Logger was in charge of the unloading operation." (R. 45)

The grounds of objection urged at the trial to the District Court's refusal to give said instruction were:

> "THE COURT: You raised that in the question on the motion for a directed verdict.
>
> MR. POWERS: Yes. The instructions go to the

same. And also the following requested instruction, which is defendant's request No. 18—that would go to the same point we asked for in respect to the Court's failure to give that." (R. 317)

* * *

"THE COURT: You may have your exceptions." (R. 320)

The grounds for a directed verdict were the same as those stated in defendant's motion for an involuntary non-suit with exceptions not here pertinent. (R. 291) The following grounds stated in support of an involuntary non-suit were incorporated by reference in the grounds of objection urged at the trial to said instruction:

"There is no evidence on which the jury could return a verdict of a violation, so we submit to your Honor that we are entitled to a nonsuit at this time, and in that connection I will call your Honor's attention to the recent authorities which have held that a man, where he is responsible for making his own working conditions, is not entitled to the protection of the Act if he fails to take a safe position if there is one open to him. We further call your Honor's attention to the undisputed evidence in this case that the deceased was the one in charge of the truck and the fastening of the chains and unfastening of the chains and making it ready for the unloading, and through no stretch of the imagination could it be argued or could a jury of reasonable-minded persons find from anything in this case that there was any defect in any of the equipment or

machinery of the C. D. Johnson Lumber Corporation. (R. 227-228)

* * *

"And we move for a nonsuit on the further ground that it appears affirmatively from the evidence that the deceased was the one that was actively in charge of the equipment of the truck and the chain and the bunk blocks, and the only thing that might possibly be said to have been negligently attached or defective in some way. There might be some inference there was something wrong with that equipment, and, on the other hand, there is no evidence that there was anything wrong with ours, with this defendant's here; and on the further ground that it was the deceased, himself, who made his own working conditions, and that there was a safe place to go, and that it appears that he got into a place where he is forbidden to go by law." (R. 234)

Said specification of error covers questions raised by Appeal Point 4(a).

Point: Evidence as to who paid the crane engineer is relevant in determining who was in charge of the unloading operation.

It has already been pointed out that defendant withheld from payments to W. R. Francis under his logging contract certain amounts for dumping the logs. (R. 155-6, 283-4) It was undisputed that the services of the crane engineer were paid for by such withholdings. (R. 279-280, 155-6)

This evidence is clearly logically relevant to show that either the logger or his contractor, the decedent log hauler, was in charge of the unloading operation. In Oregon closely analogous authority holds that such evidence may be considered. *Dibert* v. *Giebisch*, 74 Or. 64, 144 Pac. 1184, held that payments made by the defendants of the wages of men employed in clearing land was admissible as a circumstance from which the jury might reasonably have inferred that the defendants were having the work done on their own account and not by an independent contractor who was engaged to do the clearing. In that case a man hired by the independent contractor was injured cutting a stump, and the court held that the evidence sustained a finding that the man injured was in the employment of the defendants, the persons who paid him.

Keeping in mind the contractual obligation of the "logger" to deliver the logs in the water, appellant believes under the Oregon authorities that the court committed reversible error. In *McCauley* v. *Steamship "Willamette,"* 109 Or. 131, 215 Pac. 892, implicitly applied the above rule to aid in determining who is a person "having charge" within the meaning of the Oregon Employers' Liability Act. In that case a longshoreman was injured while loading lumber on a ship from a lumber company dock and he sued both the ship and the lumber company. The court said:

"5. But the 'and generally' clause did not govern the lumber company. The piling of the lumber had been completed about three weeks before the steamship came for the lumber. The work of the lumber company was ended when the piling of the lumber was completed. Nothing more remained to be done with or about the lumber except to load it upon the vessel; and the work of loading the lumber was entirely under the control of the captain of the ship. McCauley and all the other longshoremen 'employees of the ship,' took their orders 'direct from the captain of the ship,' *and were paid by the captain of the ship*. The language of the 'and generally' clause is: 'Having charge of, or responsible for, any work involving a risk or danger to the employees'." (P. 145) (Emphasis supplied)

It is significant that the court considered who paid the longshoremen in determining who was a "person having charge" within the meaning of Employers' Liability Act. Both reason and authority support the proposition that to determine under the statute who is the party "having charge of the particular work" the jury should be permitted to consider who is ultimate payor of the wages of the persons engaged in the particular work.

In *Swayne & Hoyt, Inc.* v. *Barsch*, 226 Fed. 581, this court considered evidence as to who paid the injured longshoreman in determining who was the responsible party in a case in which the Oregon statute was involved. The precise question presented was whether

the ship owner or the defendant who claimed to be managing agent only, was responsible as employer of the plaintiff. This court in reviewing the evidence said:

> "The defendant was a corporation of the state of California, doing business there, and at Portland through its local agent Kennedy. Kennedy testified that it was his duty to act for the defendant in the capacity of agent in directing the movement of ships that were being run into the port of Portland, *to pay all bills for the ships, including the bills of the men who helped to load and unload the same; that the plaintiff was on the defendant's pay roll,* and was working for the defendant; *that he (Kennedy) accounted to the defendant for the money paid out to the men; that it was the defendant's money that he was paying out to the men for unloading the ship;* that he did not report the accident to plaintiff to the owner, but to the defendant; that the defendant was the managing agent of the Camino, with power to direct the movements and operations of the officers and crew, and that it employed the officers of the ship." (Emphasis supplied) (P. 584)

The court held that this and other evidence was sufficient to show that "the defendant had full charge of the operation of discharging the ship." This case has other factual similarities to the case at bar because there a stevedore was injured on the dock when the dock foreman gave a signal to the winch operator on ship too soon and a steel beam was raised abruptly injuring the plaintiff. The defendant who had charge of

the unloading was held liable rather than the ship owner who merely provided the lifting gear as did the appellant in the case at bar.

SPECIFICATION OF ERROR IX

The District Court erred in refusing to give Defendant's Requested Instruction No. XXIII which totidem verbis was:

> "I instruct you that the Logging Safety Code of the State of Oregon provides that all bunker chains and binder chains shall so be attached that they can be released from the side opposite to the brow log and if under the evidence you find in this case that the chains used could not be detached from the side opposite to the brow log, then in that event this provision of the logging code would have been violated and in this connection you are instructed that it was the duty of the Logger Francis to see that this provision was complied with in the event the deceased was an employee of Francis; and you are further instructed that it would be the duty of the deceased to see that this provision of the safety code was complied with in the event you would find that the deceased was an independent contractor and not an employee. In short, it would be the obligation of either Francis, the Logger, or the deceased, if he were an independent contractor, to comply with this safety rule and a failure to comply with the same would be negligence as a matter of law. And if you should further find that the failure to comply with this safety rule was the sole proximate cause of the accident, then in that event there could be no recovery here and your verdict would be for the defendant." (R. 47)

The grounds of objection urged at the trial to the District Court's refusal to give said instructions were:

> "MR. POWERS: Well, then, we would like an exception if the Court please, to the Court's failure to give requested instruction No. 23, which is that the logging code provides with respect to bunker chains and that they be attached so that they can be released from the opposite side from the brow log, and also the binder chains, * * *." (R. 318)
>
> * * *
>
> "THE COURT: You may have your exceptions." (R. 320)

Said specification of error covers questions raised by Appeal Point 4(b).

Point: Either decedent or "logger" had the duty of complying with the Logging Safety Code in regard to log load chains and failure to comply was negligence as a matter of law.

Chapter No. 17 of the Logging Safety Code covers log dumps, booms, and ponds. Section 17.13 thereof provides:

> "Binder and bunk block chains shall be arranged so that all releases are made from the side of the car or truck opposite that from which the logs will roll in unloading." (P. 76)

It has already been argued that violation of the Logging Safety Code amounts to negligence as a manner of law and that argument is hereby incorporated herein. (See Specification of Error No. IV.)

In addition at the trial there was testimony by an expert called by the plaintiff that it would be unsafe practice if someone had to go between the loaded truck and the brow log in order to unfasten his chains. (R. 205) Under the facts of this case the decedent could have had no business being between the brow log and the load except to loosen his load. If he had to go there to loosen his load, he was in violation of section 17.13 of the Code.

The particular question raised by this instruction is: whose duty was it to comply with the Code? Appellant contends that either the logger, W. R. Francis, or the decedent log hauler were responsible for complying with section 17.13 and not the defendant. As has been previously pointed out Francis was obliged to deliver the logs in the water and the decedent had contracted to assist him in that endeavor. (See Specification of Error VII) To carry out his contract Francis paid for the wages of the crane engineer (R. 279-280, 155-6, 283-4), and was paid $15.00 per thousand board feet net water scale to log the timber, haul it, and dump it in the water at Toledo. (Defendant's Exhibit 1; R. 280-281) Francis testified:

"Q.: You had a contract with Johnson to haul logs, did you not? A.: Yes.

"Q. And you undertook in your contract, did you not, to comply with all the state rules and regulations with respect to the delivery of those logs? A.: Yes." (R. 161)

It was Francis's own understanding that he was to comply with state regulations like the provisions of the Logging Safety Code; and irrespective of that, he had a contractual obligation to obey all laws and rules relating to logging. (R. 280)

Whether or not Francis was not responsible for complying with the binder and bunk block chain regulation, the decedent log hauler was. He was the registered owner of the truck he was operating. (R. 10) The bunk blocks and binder chains are part of the truck equipment. (R. 132) Upon the loading of his truck the decedent put the binder chain in place. (R. 167, 170) The driver is responsible for his own equipment. (R. 259, 274) It was an agreed fact that it was the job of the driver to make his load ready for dumping. (R. 10)

The plaintiff states in her contentions that the usual procedure was for the driver to unfasten his binder chains and bunk blocks. (R. 15) It is undisputable that physically the decedent log hauler was in charge of the chains on his truck and their proper use and functioning.

The contractual arrangements of Francis and the decedent log hauler confirm that. According to plaintiff's contentions set out in the pre-trial order:

> "In July, 1949, decedent made oral arrangements with W. R. Francis to haul logs from Francis' operation to the C. D. Johnson Lumber Corporation dock at Toledo at an agreed rate per thousand board feet for the haul as compensation for the truck and for Hutchens' services as a driver. It was agreed that Hutchens would haul exclusively for Francis when he and his truck were needed. Hutchens did not agree to haul and Francis did not agree to furnish Hutchens with any certain quantity of logs or for any certain period. Either party was free to terminate the relationship at will." (R. 13)

The point at which the decedent's responsibility for delivering his logs terminated was determined by Francis' contract with the defendant and was only terminated when the logs were in the water at Toledo. Under the terms of the statute under which the Logging Safety Code was promulgated, it was incumbent on both Francis and the decedent to comply with the Code. O.C.L.A. 102-1236 so provides:

> "Every employer, employe and other person shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in connection with the matters herein specified, or in any way relating to or affecting safety of employments or places of employment, or to protect the life

and safety of employes in such employments or places of employment, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation."

An interchange between counsel at the pre-trial conference is illuminating:

"MR. POWERS: * * *.

Now, another point. Is it not your contention that he had to be between two trucks and the brow log in order to unload his truck, and that that is what he was doing at the time of the accident?

MR. BABCOCK: That's correct.

MR. POWERS: Is it not part of the Safety Code rule that your binder chain shall be so put on that it is to be unfastened and released from the opposite side of the brow logs?

MR. BABCOCK: Well, whether it is and whether that applies to the decedent in this particular situation is a question. I don't know. * * *" (R. 103)

An inspection of plaintiff's Exhibit 18, the Logging Safety Code, will show that there is no doubt that section 17.13 applies here. That section is found in the section relating to log dumps and ponds, but it is significant that similar passages occur elsewhere in the Code in other connections showing that section 17.13 is precisely in point here. See section 8.33 in Chapter 8 on loading

logs, and section 11.26 in Chapter 11 on motor truck transportation where the prohibition is set forth in boldface type. The plain meaning of the Code is that section 17.13 is applicable here and the court should have instructed the jury to find whether it was violated because its violation would be negligence as a matter of law, and either Francis or the decedent would be chargeable with and responsible for that negligence. If that negligence was the sole proximate cause of the accident, then there could be no recovery here. *Ramaswamy* v. *Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223; *Vanderflute v. P. R. L. & P. Co.*, 103 Or. 398, 205 Pac. 551.

SPECIFICATION OF ERROR X

The District Court erred in refusing to give defendant's requested instruction No. XXXIV which totidem verbis was:

> "I instruct you that if you find from the evidence that the deceased Dean Hutchens carried on his work in and around the truck in connection with the unloading of the log by himself and without the intermingling in that work of any employees of C. D. Johnson Lumber Corporation, then in that event the E.L.A. would have no application and your verdict would be for the defendant." (R. 52)

The grounds of objection urged at the trial to the District Court's refusal to give the said instructions was:

"MR. POWERS: * * * That was your instruction to them, that if risk and danger was involved—and we had a requested instruction on that matter about intermingling of employees.

THE COURT: I know the instruction.

MR. POWERS: Yes. And you left out the intermingling of employees and probably rules as a matter of law, but we think the instruction in that respect was incorrect and should have been given." (R. 318)

* * *

"THE COURT: You may have your exceptions." (R. 320)

Said specification of error covers questions raised by Appeal Point 8.

Point: Under the Oregon Employers' Liability Act an employer is not liable to the employee of another employer unless there is an intermingling of both sets of employees.

The question of intermingling between the decedent and defendant's employers under the Oregon Employers' Liability Act was a question of fact. *Walters et. al.* v. *Dock Commission*, 126 Or. 487, 266 Pac. 634, 270 Pac. 778. The court's refusal to submit the question of intermingling to the jury amounted to a ruling as a matter of law that there was no intermingling here.

Lack of intermingling is a valid defense under the Act, because it is well settled that a contractor is not liable for injuries sustained by a servant of the sub-contractor unless there is intermingling. *Tamm* v. *Sauset*, 67 Or. 292, 135 Pac. 868. The care at bar is then an a fortiori case of non-liability on the part of the defendant since it has not been established here that the decedent was a servant of the sub-contractor, Francis.

The intermingling exception to the general rule that an employer is not liable to the employees of another employer has been formulated as follows: there is liability on the part of the "non-employing" employer if there is "an intermingling both of duties and employees in the work then being prosecuted." *Drefts* v. *Holman Transfer Co.*, 130 Or. 452, 458, 280 Pac. 505.

In that phrase the court was referring to the situation existing in *Rorvik* v. *North Pac. Lumber Co.*, 99 Or. 58, 190 Pac. 331, 195 Pac. 163. In that case a ship captain standing on a wharf directing the loading of his ship was knocked into the water by the negligent action of the employers of the lumber company in handling lumber. The court held that the captain's widow might hold the lumber company liable under the Act.

The crucial fact in determining that the two sets of employees intermingled is the contract governing the relation of the employers. The contract of sale there

provided that the lumber should be placed on the wharf within reach of the ship's tackle by the lumber company, and the company was in the process of doing that when the accident happened. In the case at bar the contract governing the operation was different; here the logs had to be delivered in the water. (See the logging contract, Defendant's Exhibit 1). It can not be said that here the employers of the appellant intermingled with the decedent on the contractual dividing line between Francis and the appellant.

It was Francis's obligation to deliver the logs in the water and operations on the dock were still clearly within his contractual obligation and not on the terminal edge of that contractual obligation. This construction of the contract is supported by the fact that Francis had to pay the wages of the crane engineer in dumping the logs, and he was the only employee of the appellant necessary to the unloading operation. (R. 279-280, 155-6)

This case falls between the Rorvik case and *McCauley* v. *Steamship "Willamette,"* 109 Or. 131, 215 Pac. 892. There again the factual situation was injury to a man on a lumber dock while a ship was loading lumber. In that case the lumber company had piled the lumber ready for loading some three weeks before the accident and nothing remained to be done except to load it and that was a responsibility of the ship. The court held that

a longshoreman injured on the dock in loading could not recover from the lumber company since as a matter of law the company was not liable under the Act, although plaintiff had alleged and there was considerable evidence that defective piling of the lumber was the cause of the accident. (Pp. 137-141)

The final case in point is *Pacific States Lumber Co.* v. *Barger*, 10 F. 2d 335, decided by this court. Again the plaintiff is a longshoreman injured on a lumber company dock while loading a ship with lumber. Again the lumber company had the obligation to deliver the lumber within reach of the ship's gear. An employee of the defendant lumber company sent a load toward the plaintiff at 3 miles per hour, and the plaintiff was injured trying to stop it. The lumber company was held liable. It is clear that the accident occurred at the exact contractual dividing line between the stevedoring company and the lumber company.

In the case at bar the appellant lumber company had not yet assumed control of the logs under its contract with Francis and would not do so until they were in the water where the appellant's boom man would take over. Here there was no intermingling because the contractual obligation of Francis was not finished—the decedent was still working within the terminal edge of that obligation.

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and that this case should be reversed, with direction for judgment for appellant or for a new trial.

Respectfully submitted,

James Arthur Powers,

Norman N. Griffith,

APPENDIX

The following portions of the Oregon Employers' Liability Act, O.C.L.A. § 102-1601-6, may be pertinent to the decision of this case and are not set out in the text:

§ 102-1601. Devices, care and precautions required of owners, contractors, etc., for protection and safety of employees in dangerous employments.

"All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested, so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, when-

ever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electicity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices. (L. 1911, ch. 3 § 1, p. 16; O. L. § 6785; O. C. 1930, § 49-1701)"

§ 102-1602. Who considered agent of owner.

"The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for

damages for death or injury suffered by an employee. (L. 1911, ch. 3, § 2, p. 16; O. L. § 6786; O. C. 1930, § 49-1702)"

§ 102-1603. Duty to comply with act; penalty for non-compliance. Omitted. (Set out in the brief at page 53).

§ 102-1604. Who may prosecute damage action for death: amount of damages unlimited.

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor or any person liable under the provisions of this act, the surviving widow or husband and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the state of Oregon, then the executor or administrator of such deceased person shall have the right to maintain such action for their respective benefits and in the order above named. (L. 1911, ch. 3, § 4; L. 1919, ch. 270; O. L. § 6788; L. 1921, ch. 26, § 1, p. 38; O. C. 1930, § 49-1704.)"

§ 102-1605. Fellow-servant's negligence as defense.

"In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow-servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the

structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person had has authority to direct the doing of said act." (L. 1911, ch. 3, 5, p. 16; O.L. § 6789; O.C. 1930, § 49-1705.)

§ 102-1606. Contributory negligence.

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage. (L. 1911, ch. 3, § 6, p. 16; O. L. § 6790; O. C. 1930, § 49-1706.)"

APPENDIX II

38 U.S.C.A. sec. 516 provides insofar as pertinent:

"Where any person has heretofore allowed his insurance to lapse, or has cancelled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was

not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act as amended by Act December 24, 1919, c. 16, 41 Stat. 371 would purchase if applied as premiums when due, shall not be considered as lapsed, cancelled, or reduced; * * *."

APPENDIX III

Rule 515 of the American Law Institute Model Code of Evidence provides:

"Subject to Rule 519, evidence of a writing made as a record, report or memorandum of facts and conclusions concerning an act, event or condition, unless specifically privileged from disclosure by a statute requiring it to be made, is admissible as tending to prove the truth of the matter stated therein if the judge finds that

(a) the writing was made in the performance of the functions of his office by an official of a state or nation or governmental division

thereof, acting personally or through his subordinates, and

(b) it was a function of the official acting personally or through his subordinates

(i) to do the act, or

(ii) to observe the act, event or condition, or

(iii) to investigate the facts concerning the act, event or condition and to make findings or draw conclusions about it."